International Brotherhood of Electrical Workers, Local 1977, AFL–CIO–CLC (A. O. Smith Corporation) ***and*** **Gerald Keith Victor.** Case 9–CB–7832

April 17, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On August 26, 1991, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondent filed exceptions and a brief in support.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

This case presents the issue of whether the Union abused a contractual superseniority provision in violation of Section 8(b)(2) of the Act by designating stewards, or committeepersons as the parties refer to them, in excess of the number that the contract allowed.[1] The judge found that the effect of such excess designations was to give the committeepersons superseniority rights to the detriment of other bargaining unit employees; and he recommended that the Union be ordered to make whole any employee who had been laid off as a result of the Union's conduct in appointing excess committeepersons. For the reasons stated below, we agree with the judge's finding that designation of a third steward on one shift was unlawful, but we do not agree with him as to the second steward and we modify the Order accordingly.

I. FACTUAL FINDINGS

The contract clause in question reads as follows:

> The Company recognizes the right of the Union to designate Committeepersons on a plant-wide ratio of one (1) Committeeperson for each seventy-five (75) bargaining unit employees on the active payroll of the Company. The Union recognizes, however, that the following limitations shall be placed on the designation of Committeepersons:
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> One (1) Committeeperson may be selected from a department in which up to forty (40) employees per shift have been assigned by the Company; if more than forty (40) employees per shift have been assigned to a department, two Committeepersons may be designated. In those departments where over two (2) Committeepersons are selected, no more than two (2) may be selected from the same classification. In no event shall the total number of Committeepersons exceed plantwide ratio of one (1) Committeepersons for each seventy-five (75) employees, except for the following conditions. When there are less than seventy-five (75) employees assigned to a shift, a Committeeperson may be appointed to that shift without affecting the plantwide ratio of one (1) Committeeperson for each seventy-five (75) employees on the active payroll.

A provision elsewhere in the contract gives these committeepersons (and the Union's president and vice president) superseniority in the event of a layoff.

When he took office in 1989, Union President David Glenn designated four committeepersons pursuant to this provision: two for the first shift, and one each for the second and third shifts.[2] It is unclear how many employees were on the active payroll at that time, but it appears that there were fewer than 200. The Company raised no objection to the Union's designation of four committeepersons. This arrangement continued until April 1990, when Glenn issued a new list of officers and committeepersons, this time designating five committeepersons, three on the first shift and one each on the other shifts.[3]

When the Company's personnel manager, Jim Surber, received the Union's notification, he wrote to Glenn stating that the Company would not recognize the third committeeperson on the first shift. The letter stated:

> [I]n accordance with Article IV of our Agreement, the Company will recognize on a plantwide ratio, one Committee Person for each 75 Bargaining Unit Employees on the active payroll. At present there are only 182 employees on the active payroll with only 120 employees on the First Shift. The Company will, therefore, recognize only two Committee Persons for the First Shift Operation.[4]

[1] It is conceded that neither the superseniority nor the committeeperson appointment clause violates the Act on its face. What is contested is whether the Union violated the Act in attempting to enforce its interpretation of the committeeperson appointment language.

[2] There is no indication in the record what the practice was prior to Glenn's taking office.

[3] Glenn testified that his reason for the increase was that he believed that the employee complement had gone up by 50 or 60 employees, to over 200, and accordingly, an additional committeeperson was justified on the first shift. (Under his reasoning, the Union was entitled to one committeeperson for the first 75 employees, a second for employees 76–150, and a third committeeperson for employees 151 and up.) He further testified that he wanted to add another committeeperson to appease the truckdrivers, who felt they had been overlooked during contract negotiations.

[4] Surber testified that under his interpretation of the contract, the Union was actually entitled to only one committeeperson for the first shift (because the employee complement was below 150 on that

Surber received no response from the Union to this letter.

In November 1990, rumors started to circulate about upcoming layoffs. Charging Party Victor became concerned about what he considered an excess of committeepersons on the first shift and how their superseniority might affect layoffs. He discussed his concerns with both Surber and one of the first-shift committeepersons, but was not satisfied with their responses.

In December 1990, Glenn posted another list of officers and committeepersons, which had some changes as to the identities of committeepersons, but not as to numbers; in other words, the Union still claimed three committeepersons for the first shift. On January 10, 1991, Surber sent Glenn another letter stating again that the third committeeperson on the first shift would not be recognized by the Company, and that with only 173 employees on the active payroll (114 on the first shift), ''the Company will, therefore, recognize only two committee persons for the first shift operation.''

Victor filed the instant charge against the Union on January 29, 1991. In February or March, the Union withdrew one committeeperson. Even so, just before the hearing in the instant case, an employee with more seniority than one of the four remaining committeepersons was laid off because of the application of the contractual superseniority clause.

II. THE JUDGE'S DECISION

The judge found that the Union violated Section 8(b)(2) of the Act by insisting on not just the third, but also the second committeeperson on the first shift in December 1990.[5] He concluded that with a total employee complement of 173, all the contract allowed was one committeeperson per shift, and that the fact that there were 114 employees on the first shift did not mean that an additional committeeperson for that shift was permissible.[6] It appears that he interpreted the provisions set forth above as affording the Union the right to designate a committeeperson on a shift despite the fact that a shift did not have 75 persons working on it and that the normal plantwide ratio of one committeeperson for each 75 employees on the active payroll is not affected and still applies. Thus, the judge apparently concluded that the Union was entitled to three committeepersons, i.e., one for each shift. He found that the Union's conduct in appointing more committeepersons than the contract allowed was unnecessary to the performance of its representative function and was ''arbitrary, invidious, irrelevant and thus a mask for discriminatory motivation,'' citing *Ashley, Hickham-Uhr Co.*, 210 NLRB 32 (1974). He imputed to the Union knowledge of the coming layoffs, and concluded that the Union inflated the number of committeepersons because it desired to afford these individuals superseniority so that they could save their jobs at the expense of other employees who had greater seniority.

III. ANALYSIS

For the following reasons, we find that the Union's designation of the third committeeperson on the first shift was an unlawful attempt to induce the Company to discriminate against certain of its employees who had greater seniority, and thus violated Section 8(b)(2). We do not agree with the judge, however, that the designation of a second committeeperson on the first shift violated the Act.

Contrary to the judge, we find that the contract clause governing the appointment of committeepersons is ambiguous and reasonably susceptible to more than one interpretation. Because neither party has been able to demonstrate that the language can support only its interpretation, rules of contract interpretation indicate that extrinsic evidence may be examined in order to determine the intent of the parties. *Oil Workers Local 1547 v. NLRB*, 842 F.2d 1141, 1144 (9th Cir. 1988). Such evidence would include ''bargaining history, the parties' interpretation of the contract, the conduct of the parties, and the legal context in which the contract was negotiated.'' Id. Here we find that the parties' past practice has established a meaning for the language in issue. Since at least 1989, the parties were in agreement that two committeepersons should be allowed to serve on the first shift. Even though Surber testified that his acquiescence in this was merely an accommodation to the Union to keep the peace, and not the real interpretation he gave the contract language, we find that testimony belied by the two letters he wrote to the Union in response to its attempt to add a third committeeperson on the first shift. Surber's letters cited article IV of the contract, followed by the interpretation he gave that article. The interpretation expressly allowed two committeepersons on the first shift.

Thus, the Union's conduct in designating two committeepersons on the first shift, and the Employer's acceptance and sanctioning by letter of such a practice, reveal their intent to construe the language as allowing two committeepersons on the first shift. The Board is justified in relying on the parties' own practice with

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shift). He further testified that in an attempt to accommodate the Union, he had allowed an additional committeeperson on the first shift because the number of employees on that shift—120—was more than halfway to 150 (from 75).

[5] He found that the April 1990 designation of a third committeeperson was time-barred by Sec. 10(b). We agree.

[6] We do not pass on the judge's finding that the Union violated the contract by designating two persons from the same department.

regard to this language.[7] Indeed, it would be in error to disregard it. Accordingly, we find no violation of the Act by the Union in the designation of two committeepersons on the first shift, as it appears that the parties were in agreement that the contract language permitted such an arrangement.[8] The foregoing discussion, however, leads to a conclusion that the Union violated Section 8(b)(2) by its attempt, in December 1990, to add a third committeeperson on the first shift.[9] Essentially, by that attempt, the Union departed from the construction of the contract by which the parties had allowed two committeepersons on the first shift, without showing that there was an increase in the employee complement sufficient to justify the extra committeeperson. Thus, regardless of whether layoffs were imminent or not, we find that the Union's designation of a third first-shift committeeperson was an attempt by it to cause the Company to discriminate against its employees in violation of Section 8(a)(3), by affording an employee superseniority at the expense of other employees with greater seniority.

AMENDED REMEDY

The judge found that an unidentified employee was laid off who would not have been had there been only one committeeperson, instead of two, with superseniority on the first shift. Consequently, he provided, inter alia, in his remedy that the Union designate its one committeeperson on the first shift and that it notify the Company that (1) it had no objection to the layoff of the employee who should have been laid off had the Company complied with the contract and (2) it had no objection to the recall of the more senior employee who was improperly laid off because the Company allowed the Union to designate that extra committeeperson. He also provided that the Union make whole the latter employee.

Because we have found that the designation of a second committeeperson to the first shift was lawful, the judge's remedy is not appropriate unless the Union's attempts to cause the Employer to accept a third committeeperson on that shift led to the layoff of an employee who should not have been laid off. There is no evidence that this occurred and therefore no evidence that any employee suffered a loss of wages or benefits as a result of the Union's unlawful conduct. We also note that the Union discontinued its attempts to add a third committeeperson by withdrawing any such designations in early 1991. Therefore we do not adopt those portions of the judge's remedy as described above.

CONCLUSIONS OF LAW

1. Respondent, International Brotherhood of Electrical Workers, Local 1977, AFL–CIO–CLC, is a labor organization within the meaning of Section 2(5) of the Act.

2. By attempting to cause A. O. Smith Corporation to discriminate against its employees by designating committeepersons in excess of the number permitted in its collective-bargaining agreement with Smith in order to give said individuals superseniority rights to the detriment of other bargaining unit employees, the Respondent violated Section 8(b)(2) of the Act.

3. The unfair labor practice found above is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, International Brotherhood of Electrical Workers, Local 1977, AFL–CIO–CLC, Tipp City, Ohio, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Attempting to cause A. O. Smith Corporation (Smith) to discriminate against its employees by designating a committeeperson in excess of the number permitted in its collective-bargaining agreement with Smith in order to give that individual superseniority rights to the detriment of other bargaining unit employees.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Tipp City, Ohio office copies of the attached notice marked ''Appendix.''[10] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by Respondent's representative, shall be posted by Respondent immediately

[7] *NLRB v. Northeast Oklahoma City Mfg. Co*., 631 F.2d 669, 676 (10th Cir. 1980).

[8] Because the designation of two committeepersons on the first shift was lawful, we find no violation occurred when an employee senior to one of the two committeepersons was laid off. Thus, we do not adopt the judge's finding that the Union violated Sec. 8(b)(2) by causing Smith to discriminate against its employees in violation of Sec. 8(a)(3).

[9] In so finding, we do not rely on the judge's reasoning for finding this violation. The judge appeared to conclude that the Union's action in appointing the third committeeperson for the first shift was arbitrary and invidious, based on his finding that it did so after having gained knowledge of upcoming layoffs. The record evidence shows otherwise. At the time the Union initially designated a third committeeperson (April 1989), there was no talk of layoffs. Such talk began the following fall, and the Union did not ''inflate'' the number of committeepersons at that point or thereafter in December 1990, when it designated the third committeeperson, the designation in issue.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and return to the Regional Director sufficient copies of the notice for posting by the Employer, if willing, at all places where notices to employees are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT attempt to cause A. O. Smith Corporation (Smith) to discriminate against its employees by designating committeepersons in excess of the number permitted in our collective-bargaining agreement with Smith in order to give the individuals superseniority rights to the detriment of other bargaining unit employees.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1977, AFL–CIO–CLC

Eric V. Oliver, Esq., for the General Counsel.
Jerry A. Spicer, Esq. (Snyder, Rakay & Spicer), of Dayton, Ohio, for the Respondent.
Gerald Keith Victor, of Piqua, Ohio, for the Charging Party.

BENJAMIN SCHLESINGER, Administrative Law Judge. The collective-bargaining agreement between Respondent International Brotherhood of Electrical Workers, Local 1977, AFL–CIO–CLC (the Union), and A. O. Smith Corporation (Smith) provides for the designation of ''committeepersons,'' whose primary responsibility is adjusting grievances and enforcing the agreement. The complaint, dated March 14, 1991, alleges that the Union designated too many committeepersons, giving them superseniority to the detriment of other employees in the bargaining unit in violation of the National Labor Relations Act, 29 U.S.C. § 151 et seq. The Union, in addition to denying that it violated the Act, alleges affirmatively that the complaint is barred by Section 10(b)'s 6-month statute of limitations. The hearing was held in Columbus, Ohio, on June 24, 1991.

FINDINGS OF FACT

Jurisdiction is conceded. Smith has an office in Tipp City, Ohio, where it engages in the manufacture of electric motors. During the 12 months preceding the issuance of the complaint, it purchased and received at its facility products, goods, and materials valued in excess of $50,000 from outside Ohio. I conclude that Smith is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude that Respondent is a labor organization within the meaning of Section 2(5) of the Act.

The Union is the exclusive bargaining representative of all of Smith's production, maintenance, and inspection employees at its two plants in Ohio, excluding timekeepers, sales and service employees, office and clerical employees, professional employees, and guards and supervisors as defined in the Act. On December 22, 1988, Smith and the Union entered into a collective-bargaining agreement, effective from October 10, 1988, and expiring on October 10, 1991, which included the following provisions:

> The Company recognizes the right of the Union to designate Committeepersons on a plantwide ratio of one (1) Committeeperson for each seventy-five (75) bargaining unit employees on the active payroll of the Company. The Union recognizes, however, that the following limitations shall be placed of the designation of Committeepersons:
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> > One (1) Committeeperson may be selected from a department in which up to forty (40) employees per shift have been assigned by the Company; if more the forty (40) employees per shift have been assigned to a department, two Committeepersons may be designated. In those departments where over two (2) Committeepersons are selected, no more than two (2) may be selected from the same classification. In no event shall the total number of Committeepersons exceed plantwide ratio of one (1) Committeeperson for each seventy-five (75) employees, except for the following conditions. When there are less than seventy-five (75) employees assigned to a shift, a Committeeperson may be appointed to that shift without affecting the plantwide ratio of one (1) Committeeperson for each seventy-five (75) employees on the active payroll.
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> The Union shall notify the Company in writing of the Committeeperson appointments prior to their becoming effective.

None of these provisions would be particularly meaningful if it were not for additional provisions of the agreement that give these committeepersons, in addition to the Union's president and vice president, superseniority for the purpose of continuing to work in the event of a reduction in force. That is what gives rise to this proceeding, for when Victor, a 25-year employee, was talking in November 1990 with some of his fellow employees about a rumor of a massive layoff, they mutually felt that there were too many committeepersons for the number of employees on the day shift. He called Jim Surber, Smith's manager of personnel, to complain. Surber said that he had written to the Union's president, David Glenn, but said that Smith felt that the

Union should have two committeepersons. Victor told Surber that he disagreed, but he was not going to take issue with him at that time. In December, Victor again talked with his fellow employees about the same subject, and one of the committeepersons, Helmut Marko, entered the conversation. Victor complained that there were too many committeepersons and something ought to be done about it. Marko later reported that he had talked with Glenn, who replied that what he had done was legitimate.[1]

Smith also had its complaints. On April 27, 1990, the Union notified Smith of its list of officers, which included three committeepersons for the first shift—Marko, Bill Estridge, and Ralph Nottingham—and one committeeperson on both the second and third shifts. Surber objected, writing to Glenn that the collective-bargaining agreement required that Smith would recognize on a plantwide ratio only 1 committeeperson for each 75 bargaining unit employees on the active payroll. Because at that time Smith employed 182 employees on its active payroll, with only 120 employees on the first shift (Smith also operated a second and third shift), Surber agreed to recognize only 2 of the committeepersons on the first shift. In his testimony he explained that, under his interpretation of the agreement, the Union was entitled to only 1 designee for the first 75 of the 120 employees; but, in an attempt to reach an accommodation with the Union, solely for the purpose of having industrial peace, he allowed the Union to have a second committeeperson, for the additional 45 employees on the first shift, because 45 constituted more than a majority of 75.

Glenn never responded to this letter (he testified that he never received it, but I find that unlikely), but the issue arose again with the Union's notification on December 18, 1990. In a letter dated January 10, 1991, Surber again objected, this time calling Glenn's attention to the fact that there were only 173 employees on the total payroll, and only 114 on the first shift. Again, because there were 39 employees remaining, after deducting 75 from the employees on the first shift, he permitted the Union to designate 2 committeepersons. However, this time he also objected that the Union was entitled to designate only one committeeperson for every 40 employees in a department. Glenn, he wrote, had designated two committeepersons from department 94, which had only three employees.[2] Glenn did not respond to this letter, either. But Charging Party Victor was clearly concerned, and he filed his unfair labor practice charge on January 29, 1991. When the complaint issued in March, the Union immediately withdrew its designation of Nottingham as a committeeperson. Even later, just 3 or 4 weeks before the hearing, there was a layoff, and at least one employee with more seniority than one of the extra committeepersons, lost his job.

The Union contends that this proceeding is barred by Section 10(b) of the Act, noting that the first time the allegedly illegal designations were made was in April 1990 and that Victor knew about them at that time but did not file his charge until January 29, 1991. If the April 27, 1990 list were the only list posted by the Union, it would be correct. But the Union was entitled to change its designations at any time, and its new designations revoked its earlier ones. Glenn issued the Union's new list of officers in December 1990. When the charge was filed, this list was the only effective designation of committeeperson; and the complaint is directed to that list. The events which occurred within 6 months of the filing of the charge are sufficient to establish a violation (at least, under the counsel for the General Counsel's theory) without reference to any event outside the 10(b) period, which may in any event be used as background to the events at issue. *Bryan Mfg. Co. v. NLRB*, 362 U.S. 411 (1960); *Plumbers Local 130 (Contracting Co.)*, 272 NLRB 1045, 1047 fn. 3 (1984). I conclude that the unfair labor practice charge was filed well within the 6-month period.

Regarding the merits of the complaint, *Dairylea Cooperative*, 219 NLRB 656 (1975), enfd. sub nom. *Teamsters Local 338 v. NLRB*, 531 F.2d 1162 (2d Cir. 1976); and *Gulton Electro-Voice, Inc*., 266 NLRB 406 (1983), enfd. sub nom. *Electrical Workers IUE Local 900 v. NLRB*, 727 F.2d 1184 (D.C. Cir. 1984), hold that the grant of superseniority rights to union officials discriminates against employees for union-related reasons and is thus inherently antithetical to the employees' Section 7 rights. However, superseniority is valid if it is necessary to further the effective administration of the collective-bargaining agreement at the plant level.

The General Counsel's complaint is not premised on the invalidity of the contractual superseniority and committeeperson designation provisions. Rather, he contends that the Union arbitrarily misused its valid superseniority provision by appointing too many committeepersons, and appointing them from the same department, to the detriment of the other employees who had greater seniority but would be laid off before the union officials and designees. The only fact relied on by Glenn to justify his action was that he was trying to mollify the truckdrivers who were unhappy that they had not been represented by a committeeperson. Thus, he appointed Nottingham, who served half his time as a truckdriver. The truckdrivers' unhappiness, however, hardly justifies the appointment of three committeepersons or the duplication of the department from which the appointments were made. Glenn could have appointed Nottingham as the Union's sole committeeperson and satisfied the truckdrivers' complaint. Thus, the Union's conduct was unnecessary to the performance of its representative function, *Postal Service*, 254 NLRB 74 (1981); *Explo, Inc*., 235 NLRB 918 (1978). Using the test of *Ashley, Hickham-Uhr Co*., 210 NLRB 32 (1974), it was ''arbitrary, invidious, irrelevant and thus a mask for discriminatory motivation.''

The Union does not take issue with the General Counsel's theory. Rather, it argues that it never named too many committeepersons, while the General Counsel contends that the Union violated the collective-bargaining agreement. His argument is that the Union's right to designate 1 committeeperson for each 75 employees was limited to the number of employees on the particular shift. Thus, although Smith employed a total of 173 employees, only 114 worked on the first shift; and only the number of 114 may be used to determine the number of committeepersons that may be designated.

The above-quoted provision does not state that the designation is limited to a shift. Rather, it provides that the

[1] It is unclear exactly when these events occurred. As will be seen, the Union posted designations of its officers on two dates in 1990, April 27 and December 18. Both designate the same three individuals on the first shift to serve as committeepersons.

[2] Surber did not object to the fact that all three committeepersons had the same job classification, which also appears not in accord with the agreement.

number is determined based on the total complement of employees on Smith's active payroll. However, the rule is limited for those shifts on which are employed less than 75 employees. There, a committeeperson may still be appointed ''without affecting'' the plantwide ratio. Therefore, the plantwide ratio remained as 1 for 75, and that ratio still applies. The Union contends that the limitation means that no account should be taken for the number of employees on the second and third shifts. That is, when computing the number of committeepersons that the Union is entitled to on the first shift, or any shift with more than 75 employees, the number of employees on the two other shifts should still be considered in the formula.

I disagree. The provision was obviously intended to afford the Union the right to designate a committeeperson on a shift despite the fact that the shift did not have 75 employees working on it. The normal ratio of 1 to 75 would be waived if there were less than 75 employees. Otherwise, in computing the ratio for shifts with more than 75 employees, the ratio of 1 to 75 still applied. Furthermore, in determining the number of committeepersons that the Union is entitled to designate, only the amount of employees on that shift should be counted. The Union's theory makes no sense. For example, if Smith employed 225 employees, the Union should be entitled to 3 committeepersons. However, if the employees were on 3 shifts, 77 on the first, and 74 on the remaining 2, under the Union's formula, it would be entitled to 5, 2 because the second and third shifts had less than 75 employees, and 3 on the day shift because the formula is computed on the basis of all 225 employees, despite the fact that only 77 persons were employed on that shift. I find that the parties would not have agreed to such an improbable result.

Furthermore, another limitation on the Union's right to designate was that one committeeperson might be designated from a department with up to 40 employees. Estridge and Nottingham were in the same department (94), and the joint designation of both of them, in a department of 3 employees, violated the clear language of the agreement. The General Counsel contends that, although Marko worked in a different department (98), his department and that of the two other committeepersons were considered the same for layoff purposes. That may be so, but the parties to the collective-bargaining agreement said nothing about limiting the Union's right to designate from departments which are treated the same for layoff purposes. I will, therefore, construe the agreement literally, and find that the only violation of the contract consisted of the Union's designation of two persons from the same department.

Accordingly, I find that under the terms of the contract the Union was entitled to only one committeeperson on the day shift, because Smith employed 114 employees, and was not entitled to designate both Estridge and Nottingham, because they were employed in the same department. Surber's agreement to permit the Union to have two committeepersons on that shift was, by his own admission, never intended by the parties to the agreement, but was his accommodation to the Union to keep the peace. The Union offered no credible justification for the revision of its agreement. Grievances had not increased. As of the date of the hearing, only 2 grievances had been filed in 1991. In 1990 14 or 15 were filed. Accordingly, there was no need to add two committeepersons on the day shift and to modify the terms of the parties' agreement.

Victor and his fellow employee were aware in November 1990 of the imminence of a layoff. The Union must be presumed to have known about it, too. Nonetheless, it continued to inflate the number of the committeepersons, and I infer the reason for that was that Glenn desired to give these individuals superseniority so that they could save their jobs, at the expense of others who had greater seniority. In the absence of a legal contractual provision authorizing Glenn's modification, the Union's action arbitrarily attempted to induce Smith to unlawfully discriminate against certain of its employees who had greater seniority. I conclude that the Union violated Section 8(b)(2) of the Act.

In May or June 1991, there was a layoff. Because the Union was permitted to designate a second committeeperson, and he had superseniority, there was one employee with more seniority who was laid off and should not have been. By making its designation of too many committeepersons, the Union caused that to happen; and it is responsible to the employee who was illegally laid off. *Rubber Workers Local 374 (Uniroyal, Inc.)*, 205 NLRB 117 (1973), enfd. mem. 492 F.2d 1245 (7th Cir. 1974). I conclude that the Union violated Section 8(b)(2) of the Act by causing Smith to discriminate against its employees in violation of Section 8(a)(3) of the Act.

The unfair labor practices found herein, occurring in connection with Respondent's business, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Union has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall order the Union to make whole any bargaining unit employee for any loss of wages and other benefits he or she may have suffered by reason of being laid off as a result of the designation of a committeepersons in excess of that allowed under the collective-bargaining agreement between the Union and Smith. That amount due shall be computed in accordance with the formula prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The record does not definitively show which employee was laid off when he or she should not have been. The identity of the employee may be determined in the compliance phase of this proceeding. What is clear is that, in order to remedy the violations and to recreate what should have happened had no violations occurred, I shall recommend that the Union designate its one committeeperson on the first shift and notify Smith that it has no objection to the layoff of such employee as should have been laid off had it complied with the collective-bargaining agreement and no objection to the recall of such employee who was improperly laid off in May or June 1991 (the layoff occurred 3 or 4 weeks before the hearing in this proceeding) because Smith allowed the Union to designate an extra committeeperson. This remedy is loosely based on the rationale of the Board's remedy in *Rubber Workers Local 374*, 205 NLRB at 122–123.

[Recommended Order omitted from publication.]